

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRAVIS JAMES BURNHAM,

Defendant-Appellant.

UNPUBLISHED

August 17, 2001

No. 222832

Clinton Circuit Court

LC No. 99-006607-FC

Before: K.F. Kelly, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of first-degree murder, MCL 750.316, for which he was sentenced to life imprisonment without parole. We affirm.

Defendant first argues that he was deprived of his right to an impartial jury by the trial court's denial of his motion to change venue where there had been extensive pretrial publicity of a codefendant's trial. However, defendant waived appellate review of this issue by failing to renew his motion for change of venue after it was denied without prejudice.¹ Moreover, defendant expressed satisfaction with the jury after voir dire. The instant case is controlled by *People v Clark*, 243 Mich App 424, 425-426; 622 NW2d 344 (2000), where the Court explained:

Defense counsel moved for a change of venue before trial. The trial court denied the motion without prejudice, stating that it was willing to reconsider the motion at any time during the jury selection process. A thorough jury selection process ensued, which included lengthy juror questionnaires, the participation of the attorneys in voir dire, and sequestered questioning of each potential juror. Defense counsel never renewed the motion for a change of venue, but, rather,

¹ The trial court initially denied the motion for change of venue without prejudice, stating that it would be more appropriate to first attempt to impanel an impartial jury in Clinton County before deciding to transfer the case. The court suggested Gratiot County as a possible venue if the jury selection process in Clinton County did not produce an impartial jury. The court then allowed thorough voir dire of the prospective jurors, and conducted in-camera examinations of every juror who conceded knowledge of the case through the media. After the procedure, defense counsel expressed satisfaction with the jury and did not renew the motion for change of venue.

expressed satisfaction with the jury after the jury selection process was completed. Defense counsel's failure to renew the motion and his expression of satisfaction with the jury waived the change of venue issue. [*Clark, supra* at 426.]

Therefore, the issue was waived.

Defendant next argues that his due process rights were violated when the trial court refused to give an instruction on assault with intent to commit great bodily harm. MCL 750.84. We disagree. Defendant's requested instruction for voluntary manslaughter, MCL 750.321, was given to the jury. However, defendant was convicted of first-degree murder, under two possible theories. Defendant was not found guilty of a lesser offense than the maximum charge, even though one of his requested lesser offenses was given to the jury. Therefore, any error in not instructing on an even lesser charge would be harmless. Because the jury had a choice to convict on voluntary manslaughter, and yet convicted on the greater offense, the failure to give an assault instruction was harmless. *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990). Moreover, the failure to give the instruction was not error where the assault ended in death, and there were no real causation issues.

Defendant also argues that he was denied due process by the trial court's hypothetical given in response to the jury's question with respect to the meaning of "aiding and abetting." However, defendant has failed to explain how the hypothetical presented by the court mischaracterized the law or otherwise prejudiced defendant. Thus, defendant has failed to show reversible error.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Helene N. White
/s/ Michael J. Talbot